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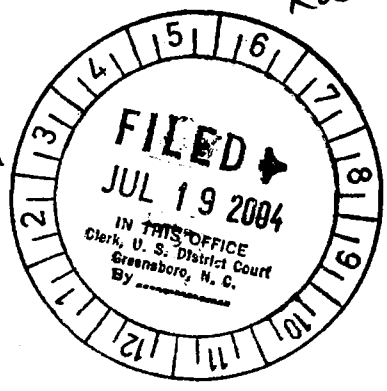

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA, Plaintiff, v. JAN H. TERRY; JASON DAVIDSON; AMANDA DAVIDSON f/k/a AMANDA B. PATTERSON; and PATTERSON PAVING, INC., Defendants.	)	CIVIL NO. 1:03CV00135

MEMORANDUM OPINION

BULLOCK, District Judge

On February 6, 2003, Selective Insurance Company of South Carolina ("Selective Insurance") filed this action for declaratory relief against Jan H. Terry, Jason Davidson, Amanda Davidson, and Patterson Paving, Inc. ("Patterson Paving"), seeking a declaration of its rights and obligations under a package of commercial insurance issued to Patterson Paving. Before the court are Selective Insurance's motion for summary judgment and Defendant Terry's motion for summary judgment pursuant to Federal Rule of Civil Procedure 56. The court has reviewed the parties' pleadings and briefs, the materials produced during discovery, and other relevant documents contained in the record. For the following reasons, Selective Insurance's

motion for summary judgment will be granted and Defendant Terry's motion for summary judgment will be denied.

FACTS

Selective Insurance is an insurance company incorporated under the laws of South Carolina and is duly authorized to transact business in North Carolina. Patterson Paving is a Virginia corporation owned and operated by James Patterson with its principal place of business in Salisbury, North Carolina. James Patterson is Amanda Davidson's grandfather, and Amanda Davidson is married to Jason Davidson. Jason Davidson, Amanda Davidson, and Defendant Terry are citizens and residents of Rowan County, North Carolina.

On May 7, 1999, Defendant Terry allegedly suffered serious injuries as a result of a head-on collision with a 1995 Toyota Corolla operated by Jason Davidson in Salisbury, North Carolina ("the automobile accident"). At the time of the automobile accident, Jason Davidson worked as a self-employed courier and the 1995 Toyota Corolla's certificate of title listed Amanda Davidson as the registered owner of the 1995 Toyota Corolla (see Pl.'s Mot. Summ. J., Ex. 9); however, Selective Insurance had scheduled the 1995 Toyota Corolla as a covered automobile under certain provisions of the package of commercial insurance that

provided Patterson Paving with commercial automobile liability coverage. On March 7, 2002, Defendant Terry filed a civil action against Jason Davidson, Amanda Davidson, and Patterson Paving in the General Court of Justice, Superior Court Division, Rowan County, North Carolina, for her alleged personal injuries arising out of the automobile accident. Selective Insurance filed this action for declaratory relief pursuant to 28 U.S.C. § 2201 et seq. to determine whether Jason Davidson and Amanda Davidson are entitled to liability coverage for any damages they might owe Defendant Terry as a result of the automobile accident under those provisions of the package of commercial insurance that provided Patterson Paving with commercial automobile liability coverage.[1]

The package of commercial insurance issued by Selective Insurance specifically designated Patterson Paving as a named insured and provided Patterson Paving with several types of insurance and liability coverage, including commercial automobile liability coverage with a $1,000,000 combined single limit of liability for any automobile covered under the terms of the

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[1]Selective Insurance has acknowledged that Patterson Paving would be entitled to commercial automobile liability coverage as a named insured under the package of commercial insurance for any damages it might owe Defendant Terry as a result of the automobile accident (see Pl.'s Br. Supp. Mot. Summ. J. at 3); however, Defendant Terry dismissed her personal injury action against Patterson Paving without prejudice in March 2003. (Jan H. Terry Ans. ¶ 9.)

policy ("the Business Auto Policy"). (See Ex. Supp. Pl.'s Mot. Summ. J., Ex. 1; see also Pl.'s Mot. Summ. J., Ex. 1A; Mem. Supp. Def. Jan H. Terry's Mot. Summ. J., Ex. A.) The package of commercial insurance also provided Patterson Paving with excess commercial automobile liability coverage in the form of an umbrella insurance policy ("the Umbrella Policy"). (See Ex. Supp. Pl.'s Mot. Summ. J., Ex. 1; see also Pl.'s Mot. Summ. J., Ex. 1C; Mem. Supp. Def. Jan H. Terry's Mot. Summ. J., Ex. A.) Selective Insurance first issued the Business Auto Policy and the Umbrella Policy to Patterson Paving through John Drye, Selective Insurance's authorized agent at the Clay Wright Insurance Agency, Inc. ("Clay Wright"), for a period of one year with effective dates of March 25, 1998, to March 25, 1999. Selective Insurance later renewed Patterson Paving's coverage under the Business Auto Policy and the Umbrella Policy for a second year with effective dates of March 25, 1999, to March 25, 2000.[2]

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[2]The package of commercial insurance also provided Patterson Paving with commercial general liability coverage with a general aggregate limit of $3,000,000 and a limit of $1,000,000 for each occurrence (Ex. Supp. Pl.'s Mot. Summ. J., Ex. 1; Pl.'s Mot. Summ. J., Ex. 1B; Pl.'s Br. Supp. Mot. Summ. J. at 2); however, Selective Insurance and Defendant Terry both agree that Jason Davidson and Amanda Davidson are not entitled to commercial general liability coverage under the package of commercial insurance for any damages they might owe Defendant Terry as a result of the automobile accident. (See Mem. Supp. Def. Jan H. Terry's Mot. Summ. J. at 2 n.1; see also Pl.'s Br. Resp. Def. Jan H. Terry's Mot. Summ. J. at 2 n.1.)

After Selective Insurance first issued the Business Auto Policy and the Umbrella Policy to Patterson Paving, an employee of Patterson Paving apparently contacted Clay Wright at James Patterson's request and asked Clay Wright to add the 1995 Toyota Corolla to the Business Auto Policy. Selective Insurance added the 1995 Toyota Corolla to the Business Auto Policy at Clay Wright's direction through an endorsement effective either July 2, 1998, or November 20, 1998. (Pl.'s Mot. Summ. J., Ex. 3; Pl.'s Br. Supp. Mot. Summ. J. at 3-4; Mem. Supp. Def. Jan H. Terry's Mot. Summ. J. at 11, Ex. D.) Selective Insurance also listed the 1995 Toyota Corolla on the Business Auto Policy's schedule of covered automobiles for the second policy year. (Id.) James Patterson testified during his deposition that he recalled asking his secretary to add the 1995 Toyota Corolla to the Business Auto Policy in 1998 when the 1995 Toyota Corolla's prior insurance coverage lapsed because he had cosigned a promissory note with Amanda Davidson for the 1995 Toyota Corolla, and he had to furnish insurance for the 1995 Toyota Corolla or pay off the loan. (Pl.'s Mot. Summ. J., Ex. 5; Mem. Supp. Def. Jan H. Terry's Mot. Summ. J., Ex. E; James C. Patterson Dep. at 12.)

After Selective Insurance added the 1995 Toyota Corolla to the Business Auto Policy, Clay Wright provided Patterson Paving with a North Carolina Certificate of Insurance Form FS-1 as proof

of financial responsibility pursuant to North Carolina's Vehicle Financial Responsibility Act of 1957, N.C. Gen. Stat. § 20-309 et seq. The North Carolina Certificate of Insurance Form FS-1 listed Patterson Paving as the owner of the 1995 Toyota Corolla and certified that Selective Insurance had provided insurance for the 1995 Toyota Corolla. (See Pl.'s Mot. Summ. J., Ex. 3.) The evidence presented does not reflect whether anyone at Clay Wright specifically asked anyone at Patterson Paving if Patterson Paving owned the 1995 Toyota Corolla or whether anyone at Patterson Paving specifically told anyone at Clay Wright that Patterson Paving owned the 1995 Toyota Corolla. Selective Insurance has not alleged that Patterson Paving made any fraudulent misrepresentations or failed to disclose any material facts that would have caused Selective Insurance to add the 1995 Toyota Corolla to the Business Auto Policy.

The Business Auto Policy's "Business Auto Coverage Form" sets forth the specific terms and conditions of coverage under the Business Auto Policy. "Section II" of the Business Auto Coverage Form is titled "Liability Coverage" and contains the following insuring agreement:

> A. Coverage
>
> We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'.

. . . .

> We have the right and duty to defend any 'insured' against a 'suit' asking for such damages. . . . However, we have no duty to defend any 'insured' against a 'suit' seeking damages for 'bodily injury' or 'property damage' . . . to which this insurance does not apply.

(Ex. Supp. Pl.'s Mot. Summ. J., Ex. 1; Pl.'s Mot. Summ. J., Ex. 1A; Mem. Supp. Def. Jan H. Terry's Mot. Summ. J., Ex. A.)

The Business Auto Coverage Form explains that "words and phrases that appear in quotation marks have special meaning" and refers to "Section V" of the Business Auto Coverage Form, which is titled "Definitions." (Id.) According to Section V of the Business Auto Coverage Form, the term "'[i]nsured' means any person or organization qualifying as an insured in the Who Is An Insured provision of the applicable coverage." (Ex. Supp. Pl.'s Mot. Summ. J., Ex. 1; Pl.'s Mot. Summ. J., Ex. 1A.) Section II of the Business Auto Coverage Form defines who qualifies as an insured for purposes of liability coverage under the Business Auto Policy as follows:

> 1. Who Is An Insured
>
> The following are 'insureds':
>
> a. You for any covered 'auto'.
>
> b. Anyone else while using with your permission a covered auto you own, hire or borrow . . . .

(Ex. Supp. Pl.'s Mot. Summ. J., Ex. 1; Pl.'s Mot. Summ. J., Ex. 1A; Mem. Supp. Def. Jan H. Terry's Mot. Summ. J., Ex. A.)

The Business Auto Coverage Form explains that the words "you" and "your" in the above definition of who is an insured refer to Patterson Paving as the named insured. (See id.) Although an endorsement to the package of commercial insurance lists James Patterson's son as an additional insured for purposes of liability coverage under the Business Auto Policy, the package of commercial insurance does not list either Jason Davidson or Amanda Davidson as a named insured for purposes of liability coverage under either the Business Auto Policy or the Umbrella Policy. (See Ex. Supp. Pl.'s Mot. Summ. J., Ex. 1; Pl.'s Mot. Summ. J., Ex. 1A.)

The Business Auto Policy's "Business Automobile Coverage Declaration" contains an "Auto Schedule" and identifies covered automobiles for purposes of liability coverage under Section II of the Business Auto Coverage Form. (See Ex. Supp. Pl.'s Mot. Summ. J., Ex. 1; Pl.'s Mot. Summ. J., Ex. 1A; Mem. Supp. Def. Jan H. Terry's Mot. Summ. J., Ex. A.) "Item Two" of the Business Automobile Coverage Declaration is titled "Schedule of Coverages and Covered Autos." (See id.) According to Item Two of the Business Automobile Coverage Declaration, Selective Insurance agreed to provide Patterson Paving with liability coverage for only those automobiles "shown as covered 'autos' for a particular coverage by the entry of one or more of the symbols from

['Section I'] of the Business Auto Coverage Form next to the name of the coverage [in the 'Coverage Schedule']." (Id.)

The symbol "1" appears on the Coverage Schedule to indicate the scope of liability coverage provided by the Business Auto Policy. (See id.) Based on the description of symbols contained in Section I of the Business Auto Coverage Form, "Any 'Auto'" listed and described in the Business Automobile Coverage Declaration for which Patterson Paving paid a premium qualified as a "covered 'auto'" for purposes of liability coverage under the Business Auto Policy. (See id.) The version of the Auto Schedule in effect on the date of the automobile accident designated by explicit description twenty automobiles, including two automobiles owned by James Patterson's son as well as Amanda Davidson's 1995 Toyota Corolla. (See id.)

The Umbrella Policy generally provided Patterson Paving with excess commercial automobile liability coverage pursuant to the same terms and conditions of coverage set forth in Section II of the Business Auto Coverage Form. "Section I" of the Umbrella Policy's coverage form is titled "Coverages" and contains the following insuring agreement:

> A. Insuring Agreement:
>
> We will pay on behalf of the insured the 'Ultimate Net Loss' in excess of the 'Retained Limit' that the insured becomes legally obligated to pay as damages because of:
>
> 1. 'Bodily Injury';

2. 'Property Damage'; or

3. 'Personal Injury' and 'Advertising Injury'

To which this insurance applies occurring during the policy period and caused by an 'Occurrence.'

(Ex. Supp. Pl.'s Mot. Summ. J., Ex. 1; Pl.'s Mot. Summ. J., Ex. 1C; Mem. Supp. Def. Jan H. Terry's Mot. Summ. J., Ex. B.) The Umbrella Policy's coverage form explains that "[t]he word 'insured' means any person or organization qualifying as such under Section II. Who is an Insured." (Id.) Section II of the Umbrella Policy's coverage form defines who qualifies as an insured for purposes of liability coverage under the Umbrella Policy as follows:

B. Each of the following is also an insured:

. . . .

2. Anyone using, with your permission, an 'Automobile' you own, or that is hired or borrowed for use by you or on your behalf and any person or organization legally responsible for the use of such 'Automobile' provided the operation or use is with your permission. . . .

5. Any other person or organization insured under any policy of 'Underlying Insurance.' The coverage afforded such insureds under this policy will be not broader than the 'Underlying Insurance' except for this policy's Limits of Insurance.

(Id.)

The Umbrella Policy's coverage form explains that "other words and phrases [appearing] in quotation marks have special meaning" and refers to "Section V" of the Umbrella Policy's coverage form, which is titled "Definitions." (Id.) According

to Section V of the Umbrella Policy's coverage form, "'Underlying Insurance' means the policies of insurance listed in the 'Schedule' and includes the limits of insurance stated in those 'Schedules.'" (Ex. Supp. Pl.'s Mot. Summ. J., Ex. 1; Pl.'s Mot. Summ. J., Ex. 1C.) The Umbrella Policy's declarations page contains a "Schedule of Underlying Insurance and Limits" that lists the Business Auto Policy as a policy of underlying insurance. (See id.)

Although the 1995 Toyota Corolla's certificate of title named Amanda Davidson as the registered owner of the 1995 Toyota Corolla on the date of the automobile accident, Defendant Terry contends that Patterson Paving owned the 1995 Toyota Corolla at the time of the automobile accident for purposes of liability coverage under the Business Auto Policy because "[it] was listed as an owned and covered auto on the policy, under 'Item [Three] -- Schedule of Covered Autos You Own' on the first page of the Declarations page of the business auto policy." (Mem. Supp. Def. Jan H. Terry's Mot. Summ. J. at 3.) The relevant portion of the Business Auto Policy appears on the first page of the Business Automobile Coverage Declaration and provides as follows: "Item Three - Schedule of Covered Autos You Own (see Auto Schedule)." (Ex. Supp. Pl.'s Mot. Summ. J., Ex. 1; Pl.'s Mot. Summ. J., Ex. 1A; Mem. Supp. Def. Jan H. Terry's Mot. Summ. J. Ex. A.) According to Defendant Terry, Jason Davidson

qualifies as an insured under the Business Auto Policy and the Umbrella Policy because "the 1995 Toyota [Corolla] was undisputedly [a] 'covered [auto] you own' on the date of the [automobile] accident." (Mem. Supp. Def. Jan H. Terry's Mot. Summ. J. at 4.)

Selective Insurance does not contest that the Business Auto Policy and the Umbrella Policy were in full force and effect on the date of the automobile accident or that Jason Davidson was in lawful possession of the 1995 Toyota Corolla when the automobile accident occurred. Instead, Selective Insurance contends that Jason Davidson does not qualify as an insured under either the Business Auto Policy or the Umbrella Policy because the phrase "a covered 'auto' you own" in Section II of the Business Auto Coverage Form refers to a vehicle titled in the name of Patterson Paving, and the 1995 Toyota Corolla's certificate of title listed Amanda Davidson as the registered owner of the 1995 Toyota Corolla on the date of the automobile accident. (Pl.'s Br. Supp. Mot. Summ. J. at 10.) According to Selective Insurance, the 1995 Toyota Corolla's certificate of title is determinative of who owned the 1995 Toyota Corolla on the date of the automobile accident for purposes of liability coverage under the Business Auto Policy, and "the language in [Item Three] of the [Business Automobile Coverage Declaration] is clearly not intended to serve as a definition in the policy." (Id. at 9-11.)

DISCUSSION

The Declaratory Judgment Act grants federal district courts discretion to entertain requests for declaratory judgments in cases of actual controversy within their jurisdiction. See 28 U.S.C. § 2201. Federal district courts have "great latitude in determining whether to assert jurisdiction over declaratory judgment actions." Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co., 139 F.3d 419, 422 (4th Cir. 1998). A federal district court may assert jurisdiction over an action for declaratory relief if a declaratory judgment "will serve a useful purpose in clarifying and settling the legal relations in issue [and] will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding." Nautilus Ins. Co. v. Winchester Homes, Inc., 15 F.3d 371, 375 (4th Cir. 1994)(internal quotations and citations omitted), abrogated on other grounds by Wilton v. Seven Falls Co., 515 U.S. 277 (1995).

"[N]umerous courts have used federal declaratory judgment actions 'to resolve disputes over liability insurance coverage, even in advance of a judgment against the insured on the underlying claim for which coverage is sought.'" Virginia Farm Bureau Mut. Ins. Co. v. Sutherland, No. Civ. A. 7:03CV00122, 2004 WL 356538, at *2 (W.D. Va. Feb. 25, 2004)(quoting Nautilus Ins. Co., 15 F.3d at 375). However, the Fourth Circuit has

articulated several factors based on federalism, efficiency, and comity that district courts should consider when determining whether to exercise jurisdiction over a diversity action for declaratory relief whenever a parallel proceeding is pending in state court:

> (1) whether the state has a strong interest in having the issues decided in its courts; (2) whether the state courts could resolve the issues more efficiently than the federal courts; (3) whether the presence of 'overlapping issues of fact or law' might create unnecessary 'entanglement' between the state and federal courts; and (4) whether the federal action is mere 'procedural fencing,' in the sense that the action is merely the product of forum-shopping.

United Capitol Ins. Co. v. Kapiloff, 155 F.3d 488, 493-94 (4th Cir. 1998)(citing Nautilus Ins. Co., 15 F.3d at 377). Applying these guidelines to the facts of the instant case, the court finds that federalism, efficiency, and comity do not weigh against the exercise of federal jurisdiction over Selective Insurance's action for declaratory relief regarding its duty to indemnify and duty to defend Jason Davidson and Amanda Davidson with respect to Defendant Terry's pending state court action. Furthermore, the exercise of federal jurisdiction over Selective Insurance's action for declaratory relief will serve a useful purpose and afford the parties relief from uncertainty as to Selective Insurance's obligations owed to Jason Davidson and Amanda Davidson under the Business Auto Policy and the Umbrella Policy. Therefore, the court will consider the merits of

Selective Insurance's motion for summary judgment and Defendant Terry's motion for summary judgment.[3]

Summary judgment must be granted when the pleadings, responses to discovery, and the record show that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of persuasion on all relevant issues. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party must come forward with specific facts demonstrating a genuine issue for trial. See Fed. R. Civ. P. 56(e); see also Cray Communications, Inc. v. Novatel Computer Sys., Inc., 33 F.3d 390, 393-94 (4th Cir. 1994)(moving party on summary judgment may simply argue the absence of evidence by which the non-moving party can prove his or her case). The non-moving party may survive a motion for summary judgment by producing "evidence from which a [fact finder] might return a verdict in his [or her] favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).

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[3]Selective Insurance alleges in its complaint that "[t]his court has jurisdiction over the parties and subject matter jurisdiction pursuant to 28. U.S.C. § 1332, based upon the diversity of citizenship of the parties and the fact that the matter in controversy is in excess of seventy-five thousand dollars ($75,000.00)." (Compl. ¶ 5.) Defendant Terry does not dispute that complete diversity exists between the parties or that the amount in controversy exceeds $75,000. (See Mem. Supp. Def. Jan H. Terry's Mot. Summ. J. at 2, n.1.)

Summary judgment is proper only when there are no genuine issues presented for trial and the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). In considering the evidence, all reasonable inferences must be drawn in favor of the non-moving party. Anderson, 477 U.S. at 255. However, "[t]he mere existence of a scintilla of evidence in support of the [non-moving party]'s position [is] insufficient; there must be evidence on which the [fact finder] could reasonably find for the [non-moving party]." Id. at 252.

A federal court sitting in diversity jurisdiction is bound to construe and apply the substantive law of the forum state, including the forum state's choice of law rules, in order to decide whether to grant a motion for summary judgment. See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); see also Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496-97 (1941). The court's initial choice of law inquiry is governed by "the principle of lex loci contractus [which] mandates that the substantive law of the state where the last act to make a binding contract occurred, usually delivery of the policy, controls the interpretation of the contract." Fortune Ins. Co. v. Owens, 351 N.C. 424, 428, 526 S.E.2d 463, 466 (2000)(citing Roomy v. Allstate Ins. Co., 256 N.C. 318, 322, 123 S.E.2d 817, 820 (1962)). According to North

Carolina General Statute § 58-3-1, "[a]ll contracts of insurance on property, lives, or interests in [North Carolina] shall be deemed to be made [in North Carolina], and all contracts of insurance the applications for which are taken within [North Carolina] shall be deemed to have been made within [North Carolina] and are subject to the laws thereof." In the instant case, Selective Insurance negotiated and delivered the Business Auto Policy and the Umbrella Policy to Patterson Paving through its authorized agent in Salisbury, North Carolina, and the Business Auto Policy as well as the Umbrella Policy provide insurance for property located in North Carolina.

Selective Insurance and Defendant Terry have made their legal arguments under North Carolina law, and neither party has argued or suggested that the law of any state other than North Carolina applies. Therefore, the court will apply North Carolina law to resolve the issues presented by Selective Insurance's motion for summary judgment and Defendant Terry's motion for summary judgment. To the extent that North Carolina law is unclear or unsettled as to the issues presented by the parties' motions for summary judgment, the court must determine how the North Carolina Supreme Court would decide if confronted with similar issues today. See Kline v. Wheels by Kinney, Inc., 464 F.2d 184, 187 (4th Cir. 1972); see also John S. Clark Co., Inc.

v. United Nat'l Ins. Co., 304 F. Supp. 2d 758, 765 (M.D.N.C. 2004).

Under North Carolina law, the meaning of language used in an insurance policy is a question of law for the court. See Guyther v. Nationwide Mut. Fire Ins. Co., 109 N.C. App. 506, 512, 428 S.E.2d 238, 241 (1993). An insurance policy is a contract and "the goal of construction is to arrive at the intent of the parties when the policy was issued." Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). Because the intent of the parties is derived from the language in the insurance policy, the language of the policy necessarily controls the interpretation of the policy. See Nationwide Mut. Ins. Co. v. Mabe, 115 N.C. App. 193, 198, 444 S.E.2d 664, 667 (1994), aff'd, 342 N.C. 482, 467 S.E.2d 34 (1996); see also Kruger v. State Farm Mut. Auto. Ins. Co., 102 N.C. App. 788, 789, 403 S.E.2d 571, 572 (1991).

"A party seeking benefits under an insurance contract has the burden of showing coverage." Owens, 351 N.C. at 430, 526 S.E.2d at 467 (citing Hedgecock v. Jefferson Standard Life Ins. Co., 212 N.C. 638, 639-40, 194 S.E. 86, 86-87 (1937)). In the instant case, Defendant Terry contends that Jason Davidson qualifies as an insured under Section II of the Business Auto Coverage Form as "[a]nyone else while using with your permission a covered 'auto' you own" because Item Three of the Business

Automobile Coverage Declaration defines the 1995 Toyota Corolla as "a covered 'auto' you own" for purposes of liability coverage under the Business Auto Policy. (Mem. Supp. Def. Jan H. Terry's Mot. Summ. J. at 14-15.) Selective Insurance contends that Jason Davidson and Amanda Davidson are not entitled to coverage under the Business Auto Policy beyond the minimum amounts of liability coverage required by North Carolina's Motor Vehicle Safety and Financial Responsibility Act of 1953, N.C. Gen. Stat. § 20-279.1 et seq. ("the Financial Responsibility Act"), because Patterson Paving did not own the 1995 Toyota Corolla on the date of the automobile accident.[4]

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[4]As of May 7, 1999, North Carolina's Motor Vehicle Safety and Financial Responsibility Act of 1953 required that automobile liability insurance policies provide minimum amounts of liability coverage as follows, in pertinent part:

> (a) A 'motor vehicle liability policy' as said term is used in this Article shall mean an owner's or an operator's policy of liability insurance, certified as provided in [N.C. Gen. Stat. §§] 20-279.19 or 20-279.20 as proof of financial responsibility, and issued, except as otherwise provided in [N.C. Gen. Stat. §] 20-279.20, by an insurance carrier duly authorized to transact business in [North Carolina], to or for the benefit of the person named therein as insured.
>
> (b) Such owner's policy of liability insurance:
>
> (1) Shall designate by explicit description or by appropriate reference all motor vehicles with respect to which coverage is thereby to be granted;
>
> (2) Shall insure the person named therein and any other person, as insured, using any such motor vehicle or motor vehicles with the express or implied permission

(continued...)

Selective Insurance and Defendant Terry apparently agree that North Carolina law permits a named insured to obtain a motor vehicle liability insurance policy for an automobile that the named insured does not own. Assuming that Jason Davidson and Amanda Davidson are at least entitled to the minimum amounts of liability coverage required by the Financial Responsibility Act, the narrow issue presented by the parties' motions for summary judgment is whether Jason Davidson and Amanda Davidson are entitled to liability coverage under the terms and conditions of

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[4](...continued)
of such named insured, or any other persons in lawful possession, against loss from the liability imposed by law for damages arising out of the ownership, maintenance or use of such motor vehicle or motor vehicles within the United States of America or the Dominion of Canada subject to limits exclusive of interest and costs, with respect to each such motor vehicle, as follows: twenty-five thousand dollars ($25,000) because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, fifty thousand dollars ($50,000) because of bodily injury to or death of two or more persons in any one accident, and fifteen thousand dollars ($15,000) because of injury to or destruction of property of others in any one accident; . . . .

(c) Such operator's policy of liability insurance shall insure the person named as insured therein against loss from the liability imposed upon him by law for damages arising out of the use by him of any motor vehicle not owned by him, and within 30 days following the date of its delivery to him of any motor vehicle owned by him, within the same territorial limits and subject to the same limits of liability as are set forth above with respect to an owner's policy of liability insurance.

N.C. Gen. Stat. §§ 20-279.21(a)-(b)(2) and (c).

coverage listed in the Business Auto Policy and the Umbrella Policy. See Sproles v. Greene, 329 N.C. 603, 613, 407 S.E.2d 497, 503 (1991)("When coverage provided in the policy is in addition to the mandatory statutory requirements, the additional coverage [is governed by the terms of the policy and] is not subject to the statutory provisions in the Financial Responsibility Act.")(citing N.C. Gen. Stat. § 20-279.21(g)); see also Younts v. State Farm Mut. Auto. Ins. Co., 281 N.C. 582, 585, 189 S.E.2d 137, 139 (1972)("In the absence of any provision in the Financial Responsibility Act broadening the liability of the insurer, such liability must be measured by the terms of the policy as written.").

Neither the Business Auto Policy nor the Umbrella Policy expressly defines the word "own" or the phrase "a covered 'auto' you own;" however, the North Carolina Supreme Court and the North Carolina Court of Appeals have articulated several rules that the court must follow to determine the meaning of the words and terms used in an insurance policy. "When the policy contains a definition of a term used in it, [that] is the meaning which must be given to that term wherever it appears in the policy, unless the context clearly requires otherwise." Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)(citing Kirk v. Nationwide Mut. Ins. Co., 254 N.C. 651, 119 S.E.2d 645 (1961)). When an insurance policy does not

contain the definition of a term used in the policy, "nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise." Id. (citing Peirson v. Am. Hardware Mut. Ins. Co., 249 N.C. 580, 107 S.E.2d 137 (1959)). "If the sense and meaning of the terms employed are clear and unambiguous, they must be given their plain, ordinary and popular connotation unless they have acquired a technical meaning in the field of insurance." Lineberry v. Sec. Life & Trust Co., 238 N.C. 264, 267, 77 S.E.2d 652, 654 (1953)(citations omitted).

The court must resolve any ambiguity or uncertainty as to the meaning of terms used in the insurance policy in favor of the insured and against the insurance company. Maddox v. Colonial Life and Accident Ins. Co., 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981). "No ambiguity, calling the above rule of construction into play, exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend." Wachovia Bank & Trust Co., 276 N.C. at 354, 172 S.E.2d at 522 (citing Squires v. Textile Ins. Co., 250 N.C. 580, 108 S.E.2d 908 (1959)). When the terms of an insurance policy are not ambiguous, "the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability

upon the [insurance] company which it did not assume and for which the policyholder did not pay." Id. (citing Williams v. Nationwide Mut. Ins. Co., 269 N.C. 235, 152 S.E.2d 102 (1967); Huffman v. Occidental Life Ins. Co. of Raleigh, 264 N.C. 335, 141 S.E.2d 496 (1965); and McDowell Motor Co. v. New York Underwriters Ins. Co., 233 N.C. 251, 63 S.E.2d 538 (1951)).

"When a statute is applicable to the terms of a policy of insurance, the provisions of that statute become part of the terms of the policy to the same extent as if they were written in [the policy]." Am. Tours, Inc. v. Liberty Mut. Ins. Co., 315 N.C. 341, 344, 338 S.E.2d 92, 95 (1986)(citing Nationwide Mut. Ins. Co. v. Aetna Life & Cas. Co., 283 N.C. 87, 194 S.E.2d 834 (1973); and Howell v. Travelers Indem. Co., 237 N.C. 227, 74 S.E.2d 610 (1953)). North Carolina General Statute § 20-4.01(26) clearly limits the definition of the term "owner" to the person holding the legal title to a motor vehicle for purposes of the Financial Responsibility Act, see Jenkins v. Aetna Cas. & Sur. Co., 324 N.C. 394, 398, 378 S.E.2d 773, 775 (1989), and "[i]t thus must be read into every liability insurance policy within the purview of the [Financial Responsibility Act] unless the context otherwise requires." Ohio Cas. Ins. Co. v. Anderson, 59 N.C. App. 621, 623, 298 S.E.2d 56, 58 (1982) (internal citation

omitted), cert. denied, 307 N.C. 698, 301 S.E.2d 101 (1983).[5] Applying the statutory definition of the term "owner" to the Business Auto Policy as a whole, including the provisions of the Business Auto Policy at issue in the instant case, the court concludes that Jason Davidson does not qualify as an insured under the terms and conditions of coverage listed in Section II of the Business Auto Coverage Form. The 1995 Toyota Corolla does not qualify as "a covered 'auto' you own" because Patterson Paving did not hold legal title to the 1995 Toyota Corolla when the automobile accident occurred. Patterson Paving simply cannot own an automobile to which it undisputedly did not hold legal title for purposes of liability coverage under the Business Auto Policy according to the statutory definition of the term "owner,"

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[5]North Carolina General Statute § 20-4.01(26) defines the term "owner" as follows:

> Unless the context requires otherwise, the following definitions apply throughout this Chapter to the defined words and phrases and their cognates:
>
> . . . .
>
> (26) Owner. -- A person holding the legal title to a vehicle, or in the event a vehicle is the subject of a chattel mortgage or an agreement for the conditional sale or lease thereof or other like agreement, with the right of purchase upon performance of the conditions stated in the agreement, and with the immediate right of possession vested in the mortgagor, conditional vendee or lessee, said mortgagor, conditional vendee or lessee shall be deemed the owner for the purpose of this Chapter.

as that term and its cognates are used in the Business Auto Policy.

Defendant Terry contends that although the statutory definition of the term "owner" is mandatory for purposes of the Financial Responsibility Act, "North Carolina case law does not extend [the statutory definition of the term 'owner'] beyond that to voluntary coverage in excess [of] that mandated by the Financial Responsibility Act." (Responsive Br. of Jan H. Terry to Pl.'s Mot. Summ. J. at 8.) The court is not aware of any North Carolina Supreme Court decision that has interpreted the term "owner" in the context of a motor vehicle liability insurance policy as Defendant Terry suggests without reference to the statutory definition of that term provided in Chapter 20 of the North Carolina General Statutes.[6] Under North Carolina law,

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[6]In Ohio Casualty Insurance Company v. Anderson, 59 N.C. App. 621, 298 S.E.2d 56 (1982), cert. denied, 307 N.C. 698, 301 S.E.2d 101 (1983), the North Carolina Court of Appeals recognized that a father who purchased an automobile, took possession of the automobile, obtained an owner's policy of motor vehicle liability insurance for the automobile, paid premiums on the policy, and wrecked the automobile causing injury to others, possessed a sufficient equitable interest in the automobile so as to make him the owner of the automobile for purposes of liability coverage even though the father had placed his son's name on the automobile's certificate of title so that legal title was transferred directly from the vendor to his son. Anderson thus created a narrow equitable exception to the general rule that the owner of an automobile for purposes of motor vehicle liability coverage is the person who holds legal title to the automobile; however, like the North Carolina Court of Appeals in North Carolina Farm Bureau Mutual Insurance Company v. Ayazi, 106 N.C. App. 475, 417 S.E.2d 81 (1992), the court believes that the

(continued...)

any liability coverage in excess of that required by the Financial Responsibility Act is voluntary, and an insurance carrier's liability for such voluntary coverage necessarily depends on the specific terms and conditions of coverage contained in the liability insurance policy at issue. See Nationwide Mut. Ins. Co. v. Edwards, 67 N.C. App. 1, 4, 312 S.E.2d 656, 658-59 (1984). The North Carolina Supreme Court has clearly articulated that when an insurance policy contains the definition of a term, the court must accept that definition and must apply that definition throughout the policy in question unless the context of the term requires otherwise. See Kirk, 254 N.C. at 655, 119 S.E.2d at 647-48 ("Thus when a term . . . is defined in an insurance policy, though not specifically in reference to the coverage in question, the definition [applies] to all clauses of the contract, including the coverage in controversy, unless it is made inapplicable by the express language of the contract, or is inconsistent with and repugnant to the provisions of the coverage under consideration.")(citing Lancaster v. S. Ins. Co., 153 N.C. 285, 288, 69 S.E. 214 (1910)). The court is bound to construe the term "owner" and its cognates

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[6](...continued)
discrete facts and circumstances present in Anderson are entirely distinguishable from the facts and circumstances of the instant case for the reasons stated by the North Carolina Supreme Court in Jenkins v. Aetna Casualty and Surety Company, 324 N.C. 394, 378 S.E.2d 773 (1989).

consistently throughout the Business Auto Policy according to the above stated rules of construction established by the North Carolina Supreme Court.

The context in which the term "own" and the phrase "a covered 'auto' you own" appear within Section II of the Business Auto Coverage Form and Item Three of the Business Automobile Coverage Declaration neither requires nor permits the application of any definition other than the statutory definition of the term "owner", as that term and its cognates are used throughout the Business Auto Policy. Although Defendant Terry contends that Item Three of the Business Automobile Coverage Declaration defines the 1995 Toyota Corolla as "a covered 'auto' you own" for purposes of liability coverage under the Business Auto Policy, the express language of Item Three does not contain a clear definition of any terms used in the Business Auto Policy and does not resemble an insuring agreement between Selective Insurance and Patterson Paving. Moreover, Item Three does not contain a specific list of automobiles identified as covered autos that Patterson Paving owned for purposes of liability coverage under the Business Auto Policy and does not explicitly define the 1995 Toyota Corolla as "a covered 'auto' you own" for purposes of liability coverage under the Business Auto Policy. Item Three of the Business Automobile Coverage Declaration contains merely a general reference to the Auto Schedule and does not provide a

precise definition of the term "own" or the phrase "a covered 'auto' you own" that would otherwise replace the statutory definition of the term "owner," as that term and its cognates are used throughout the Business Auto Policy.

"Absent ambiguity reasonably susceptible to conflicting interpretations, courts must enforce the [insurance] contract as written, giving effect to each word and clause." Edwards, 67 N.C. App. at 4, 312 S.E.2d at 659. "Since the objective of construing an insurance policy is to ascertain the intent of the parties, the courts should resist piecemeal constructions and should, instead, examine each provision in the context of the policy as a whole." DeMent v. Nationwide Mut. Ins. Co., 142 N.C. App. 598, 602, 544 S.E.2d 797, 800 (2001) (citing Blake v. St. Paul Fire and Marine Ins. Co., 38 N.C. App. 555, 557, 248 S.E.2d 388, 390 (1978)). Based on the terms and conditions of coverage listed in Section II of the Business Auto Coverage Form and the statutory definition of the term "owner," as that term and its cognates are used throughout the Business Auto Policy, neither Jason Davidson nor Amanda Davidson qualify as "[a]nyone else while using with your permission a covered 'auto' you own" because Patterson Paving did not own the 1995 Toyota when the automobile accident occurred. Therefore, the court concludes that Jason Davidson and Amanda Davidson are not entitled to liability coverage under the terms and conditions of coverage

listed in the Business Auto Policy beyond the minimum amounts required by the Financial Responsibility Act as a matter of law.

The court also finds that Jason Davidson does not qualify as an insured under the terms and conditions of coverage listed in Section II of the Umbrella Policy's coverage form for the reasons stated above. As a result, Jason Davidson and Amanda Davidson are not entitled to excess liability coverage under the insuring agreement contained in Section I of the Umbrella Policy's coverage form as a matter of law. Therefore, the court will grant Selective Insurance's motion for summary judgment and the court will deny Defendant Terry's motion for summary judgment.

CONCLUSION

For the foregoing reasons, Selective Insurance's motion for summary judgment will be granted and Defendant Terry's motion for summary judgment will be denied.

An order and judgment in accordance with this memorandum opinion shall be entered contemporaneously herewith.

July 19, 2004

United States District Judge